In the High Court of Punjab and Haryana at Chandigarh

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Criminal Writ Petition No.792 of 2007

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Date of decision :10.9.2007

Swaran Lata Jain

…..Petitioner

v.

Union of India

…..Respondent

…..

Present: Mr. Vikram K. Chaudhri, Mr. Sant Pal Singh and Mr. Akshay Anand, Advocates for the petitioner.

Mr. D.K. Bhatti, Advocate for the respondent.

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**S.S. Saron, J.**

The petitioner by way of the present petition under Article 226 of the Constitution of India prays for issuance of a writ in the nature of Habeas Corpus and for setting aside the order of detention dated 8.3.1988 (Annexure-P.9) passed by the respondent under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (`Act' – for short) against her husband-detenu Joginder Pal Jain (hereinafter referred to as `the detenu').

The petitioner has submitted that the impugned order of detention dated 8.3.1988 (Annexure-P.9) has been executed after an inordinate delay on 16.7.2007 which is in violation of the fundamental rights on the detenu. The detention order inter alia records that the detaining authority is specifically empowered under Section 3(1) of the Act and was satisfied with respect to the detenu Joginder Pal Jain that with a view to prevent him from smuggling goods it is necessary that he be

detained and kept in custody in District Jail, Faridkot. The husband of the petitioner, it is stated, is a mass popular leader of Moga. He remained Chairman of the Improvement Trust, Moga from 1994 to 2002 as well as the President of the Municipal Council, Moga. He contested the recently concluded Legislative Assembly Elections from the Moga Assembly constituency as a Congress candidate and defeated the candidate of the Shiromani Akali Dal. The detenu at present is a Member of the Legislative Assembly (MLA) from Moga constituency.

On 29.1.1988, the detenu for boarding the Thai International Flight for Hong Kong had gone to the IGI Airport, New Delhi. He checked in with a card board carton as checked baggage and a brief case as hand baggage. There were other co-travellers including one Manohar Lal Grover who was also to travel to Hong Kong on the same flight. The said Manohar Lal Grover checked in with his baggage, which were a sea-green coloured suit case as checked baggage and a small hand bag as hand baggage. After checking in, the baggage of the said Manohar Lal Grover was searched by the Customs officials. In the course of search Indian and foreign currency was found, which was seized as it was being illegally exported without declaration Nothing incriminating is stated to have been found during search of the detenu. However, while the detenu was waiting for his turn the Customs Officer let off Manohar Lal Grover and the detenu was taken in custody. He was taken to the Customs office and detained there till 31.1.1988. It is alleged that the detenu was pressurized to write a statement that the sea-green coloured suit case and the foreign exchange belonged to him. Meanwhile, the residential and business premises of the detenu were

searched for about 8 hours. The statements of the detenu and Manohar Lal Grover were recorded under Section 108 of the Customs Act, 1962 which it is alleged, were under coercion, duress and threat. The said Manohar Lal Grover was a clerk to the Deputy Commissioner, Faridkot. He has since died. On 30.1.1988, the detenu was produced before the Additional Chief Metropolitan Magistrate, New Delhi along with an application for grant of remand. It is stated that the detenu retracted from his statement obtained from him under duress. The copy of the application (Annexure-P.1) for judicial remand and the copy of the application (Annexure-P.2) whereby the detenu retracted from his statement recorded under Section 108 of the Customs Act, 1962 have been placed on record. The detenu was then remanded to judicial custody till 12.2.1988. The grounds which have been made the basis for passing of the detention order against the detenu are enumerated in the application (Annexure-P.1) for judicial remand and inter alia are that he was attempting to take Indian and foreign currency amounting to Rs.16,19,781.79 while he was going to Hong Kong. It has been alleged that the detenu had intentionally handed over the sea-green colour VIP suit case to his co-traveller and the currency was recovered from the sea-green colour suit-case. The detenu submitted an application (Annexure-P.3) for grant of bail before the learned Additional Chief Metropolitan Magistrate, New Delhi on 10.2.1988 in which he again retracted from his earlier confessional statement. The learned Additional Chief Metropolitan Magistrate, New Delhi vide order dated 1.3.1988 (Annexure-P.4) enlarged the petitioner on bail. However, it is alleged that to scuttle the release of the detenu on bail the impugned order of detention

was passed on 8.3.1988 (Annexure-P.9). The detenu being apprehensive that his liberty would be affected, filed writ petition No.708 of 1988 before the Calcutta High Court so as to assail the detention order dated 8.3.1988 (Annexure-P.9) at the pre-execution stage. It is submitted that the detenu was carrying on his pharmaceutical business at Calcutta as well and was apprehending the execution of the order there. Therefore, the writ petition was filed in the Calcutta High Court. In terms of order dated 16.3.1988 (Annexure-P.5), the Hon'ble Calcutta High Court was pleased to issue notice to the respondents therein besides interim relief was granted whereby the respondents were restrained from giving effect to the detention order till 4.4.1988. In the meantime, the detenu was to serve a copy of the petition upon the respondents. In default of effecting the service, the interim order, it was observed, shall stand vacated. Liberty was also given to the respondents to apply for vacating the interim order upon notice to the detenu. The Area Custom Officer IGI Airport, New Delhi on 8.4.1988 filed a complaint under Sections 132 and 135(1)(a) of the Customs Act before the learned Additional Chief Metropolitan Magistrate New Delhi against the detenu. The detenu was summoned to face trial in the said case. The detenu was ultimately acquitted in the said case vide order dated 29.9.2006 (Annexure-P.7). It was held that the prosecution/complainant had failed to prove the charge against the accused beyond reasonable doubt and by giving benefit of doubt to the detenu he was acquitted. The writ petition filed by the detenu before the Hon'ble Calcutta High Court remained pending. It is submitted that the Sponsoring Authority as well as the detaining authority had not filed any reply to the aforesaid writ petition. In any case, vide order

dated 27.2.2001 (Annexure-P.6) the writ petition was dismissed in default as no one appeared for either of the parties. It was also ordered that the interim order, if any, is vacated and rule, if any, is discharged. It is submitted that now after a lapse of 18 years from the passing of the detention order on 8.3.1988 (Annexure-P.9), the detenu on 16.7.2007 has been taken in custody by Paramdeep Singh Sandhu, Superintendent of Police (Headquarters), Moga. He was apprehended from Chandigarh. Copy of the DDR No.31 dated 16.7.2007 (Annexure-P.8) recorded in this regard at Police Station Sector 3, Chandigarh has been placed on record. The detenu has been taken to District Jail, Faridkot and detained there. In the intervening night of 16/17.7.2007, the detenu was served with the order of detention as well as the grounds of detention. It is submitted that the detention order has been tampered with by the S.P. (Headquarters), Moga by scoring out the words `Central Jail, Amritsar' and substituting them with `District Jail, Faridkot'. The said order of detention is assailed by way of the present petition on the grounds that there is an inordinate delay in the execution of the detention order, non-consideration of the relevant material by the detaining authority, the relied upon documents in support of the detention order were not supplied *parri passu* with the detention order and the fact of acquittal in the criminal case was not taken into account by the detaining authority.

On notice, a counter-affidavit has been filed by the Joint Secretary to Government of India, Ministry of Finance, Department of Revenue, New Delhi. The brief facts of the case have been recounted. It is stated that at the time of boarding the Thai Airways Flight to Hong Kong on 29.1.1988 the detenu gave his name as Mohan Lal son of Shri Ram Lal. He

was travelling on Thai Airways passenger ticket along with his friend Manohar Lal Grover. On being asked by the Air Customs Officer the detenu brought his checked baggage comprising one card board carton bearing Thai Airways baggage and one sea-green colour VIP suit case bearing Thai Airways baggage bag which he produced on the customs counter along with his black colour brief case `Dunson' which was his hand baggage. His co-traveller Manohar Lal Grover had only one small zipper hand bag as hand baggage. Manohar Lal Grover disclosed that the person with whom he was travelling and who reported with him at the Customs counter by the name of Mohan Lal was actually Joginder Pal Jain son of Shri Panna Lal Jain (detenu) but in the said visit he was travelling by the name of Mohan Lal with a passport issued at Chandigarh on 11.8.1986 bearing his photograph and name as Mohan Lal. He had got made the said passport in a fake name from Chandigarh. In the presence of witnesses he identified his checked in baggage i.e. Card board carton and also his sea-green colour suit case. Besides, black colour brief case as the hand baggages. The detenu admitted the ownership of these baggage. He also admitted in the presence of witnesses that while at the airline checking counter he gave his sea-green colour VIP suit case to his friend Manohar Lal Grover for getting it checked in, in his (Manohar Lal Grover's) name although it belonged to the detenu. Before checking the accompanied baggage it was inquired from the detenu whether he was keeping/carrying any contraband, restricted or prohibited items viz. Indian or foreign currency in his baggage or on his person. He replied in the negative and declared only the items of his personal use. In the presence of witnesses the

baggage was checked by the Customs Officers and foreign currency in the shape of currency notes, travellers cheques, cheques, money orders, international money orders, global money orders, pay orders, demand drafts, passport orders etc. which in all were equivalent to Rs.16,12,317.89 were recovered. These were found concealed in sweet packets. His personal search resulted in recovery of Indian and foreign currency amounting to Rs.7,463.90. The detenu was found travelling in the name of Mohan Lal and he could not produce any evidence documentary or otherwise or any permission from the Reserve Bank of India showing the lawful export in respect of the recovered foreign and Indian currency. The same, therefore, was seized under Section 110 of the Customs Act on the reasonable belief that the same had been admitted to being exported out of India in violation of the restrictions imposed on the export thereof under the provisions of FERA, 1973 and Customs Act, 1962. These were liable for confiscation under the provisions of the Customs Act, 1962. In the voluntary statement dated 29.1.1988 the detenu inter alia stated that his actual name was Joginder Pal Jain but he was holding passport in the name of Mohan Lal which bears his photograph and was issued at Chandigarh on 11.8.1986. The detenu also admitted that Manohar Lal Grover was known to him for the last 15 years as he belonged to Moga and that he met him at the Airport on 28.1.1988 with one hand baggage. He was booked to go to Hong Kong by Thai Airways flight. Besides, Manohar Lal Grover had no concern whatsoever with the recovered currencies, travellers cheques, demand drafts, BPOs, GPOs etc. and these belonged to the detenu and purchased by him from the money which was lying with him as his savings for the last 20

years. Manohar Lal Grover in his voluntary statement dated 29.1.1988 inter alia stated that he and the detenu were to travel to Hong Kong and as a matter of fact it was already arranged that they would meet at Broadway Hotel and thereafter, at the entrance gate of the departure hall. Manohar Lal Grover also informed that the passenger's name with whom he was travelling and from whom foreign exchange had been recovered was Joginder Pal Jain (detenu) and not Mohan Lal. The detaining authority, it is submitted, after careful consideration of the material placed before it and relied upon by it came to its substantive satisfaction that the activities of the detenu amount to smuggling since his acts and omissions rendered the goods liable to be confiscation under Section 113 of the Customs Act. The detaining authority was further satisfied that the detenu needs to be detained under the Act with a view to preventing him from smuggling goods in future. Accordingly, the detention order dated 8.3.1988 was passed. It is accepted that the detenu has been detained on 16.7.2007 and lodged at District Jail, Faridkot. The detenu was granted parole by the Central Government for two days i.e. 18.7.2007 and 19.7.2007 to cast his vote for the Presidential elections. A reference has also been made to the Hon'ble Central Advisory Board, New Delhi on 7.8.2007 under Section 8(b) of the Act for their opinion as to whether sufficient cause does exist for the detention of the detenu. The meeting of the Hon'ble Central Advisory Board, it is submitted, is likely to be held shortly. It is also submitted that the detenu has a right to make a representation against the order of detention and since the husband of the petitioner has not availed the alternative remedy the present petition is premature. Even otherwise, the respondent

has made a reference in respect of the detention order to the Advisory Board constituted under Article 22 (4) of the Constitution of India as provided under Section 8 of the Act. The Advisory Board is to submit its report within 11 weeks after hearing the detenu in person, if he desires to be heard. It is submitted that in case the Advisory Board opines that there is no sufficient cause for detention of the detenu, the government would revoke the detention order and the detenu would be released forthwith. Therefore, also it is submitted that the writ petition is premature. It is further submitted that there has been a major concealment of fact. The petitioner has suppressed the fact that on the same day i.e. 29.1.1988 when he was apprehended by the police at the IGI Airport, case FIR 22 of 1988 (Annexure R1) was registered against him in respect of the offences under Sections 419 and 417 IPC read with Section 12 of the Passport Act. In pursuance of the said FIR, the detenu was tried and he stands convicted vide order dated 7.1.1992 (Annexure-R.2) by the Court of Additional Chief Metropolitan Magistrate, New Delhi. It is, however, also submitted that though the said FIR is not a ground on the basis of which the detention order was passed, in any case, the same substantiates the fact that the detenu was keeping dual identity for travelling abroad. An objection has also been raised with regard to non-joinder of the Punjab State as a party which according to the respondent is a necessary party as the detention order was executed by it. Besides, it is submitted that the petition is liable to be dismissed as the detention order, the quashing of which is sought, was assailed by the petitioner by way of Writ Petition 708 of 1988 before the Calcutta High Court. The said writ petition admittedly stands dismissed

vide order dated 27.1.2001 (Annexure P6). Therefore, the petitioner is estopped from challenging the same order before this Court. No review petition or appeal has been filed against the aforesaid order dated 27.2.2001 dismissing the earlier writ petition filed by the detenu. It is submitted that no fundamental right of the detenu has been violated. In fact, the detenu was involved in the illegal export of foreign currency/instruments amounting to Rs 16,19,781.79 out of the country. The detaining authority after careful consideration of the material placed before it, reached its subjective satisfaction that the activities indulged in by the detenu amounted to smuggling and, therefore, he was liable to be detained under the Act. It is also submitted that the detention order against the detenu was issued on 8.3.1988. However, its execution was stayed by the Hon'ble Calcutta High Court vide order dated 16.3.1988 (Annexure-P.5). The interim order passed by the Hon'ble Calcutta High Court staying the execution of the detention order was vacated vide order dated 27.2.2001. Thereafter, the detention order has been executed on 16.7.2007. Thus, the detention order remained unexecuted from 8.3.1988 to 16.3.1988 and from 27.2.2001 till 15.7.2007 i.e. for a total period of approximately 6-1/2 years and not 19 years as alleged by the petitioner. It is also submitted that the proceedings in Writ Petition 708 of 1988 before the Hon'ble Calcutta High Court were to be followed up by the office of the Commissioner of Customs (Airport Admn.), Kolkata. Due to frequent change of the customs staff at Calcutta and due to administrative reasons, the actual status of the case was not readily available. Later on, the matter was taken up with the Registrar, Calcutta High Court and the Branch Secretariat, Ministry of Law, Kolkata.

Ultimately, the copy of the order dated 27.2.2001 regarding the dismissal of the writ petition and consequent vacation of the stay duly signed by the Assistant Registrar, Calcutta High Court was received by the Calcutta Customs on 10.7.2007. On receipt of the same, the Assistant Commissioner, Customs, IGI Airport, New Delhi vide letter dated 12.7.2007 sent a copy to the Additional Director General of Police (Intelligence) Punjab, Chandigarh for execution of the detention order and the detenu was detained on 16.7.2007. Therefore, it is submitted that immediately on receipt of the certified copy of the order of vacation of stay, the detention order was executed. A copy of the letter dated 11.7.2007 (Annexure-R.3) issued by the Commissioner of Customs (Airport and Admn.) Kolkata and letter dated 12.7.2007 (Annexure-R.4) issued by the Commissioner of Customs, IGI Airport New Delhi have been placed on record. As regards the acquittal of the petitioner by the learned Additional Chief Metropolitan Magistrate, New Delhi, vide order dated 29.9.2006 (Annexure-P.7), it is submitted that in the concluding para of the order, it has been observed that the prosecution/complainant had failed to prove the charge against the accused (detenu) beyond reasonable doubt and, therefore, benefit of doubt was given. Accordingly, an order of acquittal was passed. It was also observed that Manohar Lal Grover had expired during the proceedings and the other witnesses could not be found. The Customs Department has preferred an appeal before the Delhi High Court against the order dated 29.9.2006 acquitting the detenu. Therefore, it is submitted that the order of the learned Additional Chief Metropolitan Magistrate, New Delhi acquitting the detenu in the criminal proceedings, has not attained finality. The allegations of

tampering with the detention order dated 8.3.1988 (Annexure P9) are denied. It is stated that it was for the welfare and convenience of the family that the detenu has been lodged at District Jail, Faridkot and there was no ulterior motive to tamper with the detention order by substituting the words "District Jail, Faridkot" in place of "Central Jail, Amritsar". No prejudice has been caused to the detenu by such substitution. Rather, the same has been done considering the convenience of the family of the detenu in a most bona fide manner. It is also submitted that the order of detention and the grounds of detention were served on the detenu with the authentic signatures of the detaining authority. The grounds of detention are true and authentic. The non-availability of stamp of the detaining authority on each page of the grounds of detention does not take away the authenticity of these documents. As regards the allegations about the non-supply of relied upon documents along with the grounds of detention, it is submitted that the SSP Moga informed on the night intervening 16/17.7.2007 that the grounds of detention were served on the detenu along with the order of detention by the Deputy Jail Superintendent, Faridkot which were duly received by the detenu. However, the detenu refused to sign the receipt of the relied upon documents (152 pages) which were presented to him by the SP (HQ), Moga along with the grounds of detention. The detenu cited ill health and fatigue as the reason for not receiving and signing each page of the 152 pages of the relied upon documents. Thereafter, the SP (HQ) Moga and the Police party accompanying him, returned to Moga along with the set of relied upon documents. On the next day i.e. 18.7.2007, the detenu was released on parole for 2 days and he left for New Delhi to cast his vote for

the Presidential election and was again lodged in Faridkot Jail on 20.7.2007. Thereafter, the relied upon documents were served by the SP (HQ) Moga on the return of the detenu from parole on 20.7.2007 when the detenu willingly signed the receipt on each page of the 152 pages of the relied upon documents, in the presence of the Jail authorities. Therefore, it is stated that the detenu himself is responsible for the non-receipt of the relied upon documents *parri passu* with the grounds of detention.

Mr. Vikram K. Chaudhri, Advocate, learned counsel for the petitioner has submitted that the impugned order of detention dated 8.3.1988 (Annexure P9) is liable to be quashed for the reason that there is an inordinate and gross delay from the passing of the detention order on 8.3.1988 and its execution on 16.7.2007. Therefore, it is submitted that the live link between the order of detention and the actual detention is snapped. As such, the detention order is vitiated. It is also contended that the relevant and necessary material furnished by the sponsoring authority were not placed before the detaining authority and this led to non-consideration of the necessary material by the detaining authority on account of which the subjective satisfaction of the detaining authority stands impaired. It is further submitted that the application for judicial remand dated 30.1.1988 (Annexure P1), the application dated 30.1.1988 (Annexure-P.2) whereby the detenu retracted from his alleged statement under Section 108 of the Customs Act at the first available opportunity, the application dated 10.2.1988 (Annexure P3) before the Additional Chief Metropolitan Magistrate, New Delhi whereby the detenu again retracted from his statement and the order dated 1.3.1988 (Annexure P4) whereby the detenu was granted parole, were relevant and necessary material which were liable

to be taken into consideration by the detaining authority and failure to do so vitiates the order of detention. It is further contended that the relied upon documents in support of the detention order were not supplied *parri passu* with the grounds of detention. The detenu was not supplied any list of the documents nor the relied upon documents. This serious lapse of non-supplying the relied upon documents after serving the grounds of detention renders the service of grounds of detention to be invalid and illegal. It is also contended that before the execution of the detention order on 16.7.2007, the detaining authority was liable to take into account the fact that the detenu had been acquitted by the learned Additional Chief Metropolitan Magistrate, New Delhi vide order dated 29.9.2006 (Annexure P7). Had this fact been actually placed before the detaining authority, it is submitted, the same would definitely have made an impact on its mind regarding the futility of the exercise of detaining the detenu.

In response, Mr. D.K. Bhatti, Advocate, learned counsel for the respondent has vehemently opposed the petition that has been filed and it is submitted by way of preliminary objection that the writ petition is premature as the matter regarding the confirmation of the detention is to be considered by the Advisory Board and in case in the opinion of the Advisory Board there is no sufficient cause for detention of the detenu, the detention order is to be revoked as the opinion of the Advisory Board is binding upon the government. It is also submitted that the detenu is estopped by his act and conduct from filing the present petition inasmuch as the earlier writ petition i.e. Writ Petition 708 of 1988 before the Calcutta High Court against the same order of detention has already been dismissed. The other preliminary objections that have been raised are that there has been material

concealment of fact that the detenu was also proceeded against on 19.1.1988 in case FIR 22 of 1988 (Annexure-R.1) that was registered against the detenu under Sections 419 and 417 IPC read with Section 12 of the Passport Act. In terms of the said FIR, the detenu was convicted by the learned Additional Chief Metropolitan Magistrate, New Delhi vide order dated 7.1.1992 (Annexure R2) and thereafter released on probation. This fact, it is submitted, was liable to be brought to the notice of the Court and the suppression of the same would warrant dismissal of the writ petition as it goes to show that the detenu was keeping dual identity for travelling abroad. It is next contended that the non-impleadment of the State of Punjab as a party, would also warrant the dismissal of the writ petition as it is the Punjab Govt. which is to execute the detention order and to expedite the necessary procedure. Besides, it is submitted that at the time of filing the writ petition 708 of 1988 before the Calcutta High Court, the detenu had impleaded all the necessary parties including the State of Punjab as also the Police Authorities at Moga and Faridkot. Therefore, it is not such a case where the detenu can be said to be unaware of the necessity of impleading the necessary parties including the State of Punjab. On merits, it has been submitted that there is no inordinate or gross delay in the execution of the detention order. It is submitted that it is incorrect on the part of the detenu to say that the detention order remained unexecuted for about 19 years as the detenu himself had obtained an order of stay from the Calcutta High Court on 16.3.1988 which continued upto the dismissal of the writ petition before the Calcutta High Court till 27.2.2001 (Annexure-P.6). Thereafter, due to change of staff at the Kolkata Customs and Delhi Customs, the status

of the case before the Calcutta High Court could not be ascertained. In any case, it is submitted that the government has desired that a departmental inquiry be conducted in the case as to why no action was taken from 2001 till the time steps were taken to obtain the copy of the order from the Calcutta High Court and execute the order. Therefore, it cannot be said that there is any lapse on the part of the government. It is also submitted that the contention with regard to non-placement of the relevant material and documents by the sponsoring authority leading to consequent non-consideration thereof by the detaining authority, is inconsequential. It is submitted that all the necessary and relevant materials which were liable to be taken into consideration for the purpose of passing the detention order and reaching the subjective satisfaction of the detaining authority were duly placed before the detaining authority. Therefore, it is submitted that the contention of the learned counsel for the petitioner is without any force. As regards the non-supplying of the relied upon documents *parri passu* with the grounds of detention, it is submitted that on the night intervening 16/17.7.2007, the grounds of detention were served on the detenu along with the order of detention by the Deputy Jail Superintendent, Faridkot which were signed by the detenu. However, the detenu refused to sign the receipt of the relied upon documents (152 pages) which were presented to him by the SP (HQ) Moga. The detenu cited ill health and fatigue as the reason for not receiving and signing the documents. Thereafter, the detenu was on parole for 2 days as being a MLA he had gone to New Delhi to cast vote for the Presidential elections and he was again lodged in jail at Faridkot on 20.7.2007 when the documents were served on him. In any

case, it is submitted that this aspect would have more appropriately been replied to by the State of Punjab which served the detention order and also supplied the material in support of the detention order. For the failure to implead the State of Punjab as a party, the petitioner is not liable to suffer. It is also submitted that the fact that the detenu has been acquitted by the learned Additional Chief Metropolitan Magistrate, New Delhi, vide his order dated 29.9.2006 (Annexure P7) is inconsequential as the same was not there at the time of passing the detention order on 8.3.1988 (Annexure P9) and it is only at the time of passing of the order of detention that the material is to be considered and there is no provision for consideration of the material again before the execution of the detention order.

I have given my thoughtful consideration to the contentions of the learned counsel for the respective parties and also perused the records of the case.

The preliminary objection raised by Mr. Bhatti, learned counsel for the respondent may be considered at the first instance. The contention that the writ petition is premature as the matter has been referred to the Advisory Board which is to give its opinion, is devoid of any merit. It may, be noticed that the present petition is a petition praying for the issuance of a writ of habeas corpus wherein it has been alleged that there is a threat to the liberty of the citizen. Therefore, this Court is not denuded from exercising its supervisory writ jurisdiction where the liberty of a citizen is involved merely because the government has referred the matter for confirmation of the order of detention to the Advisory Board. In Prabhu Dayal Deorah v. District Magistrate, Kamrup, AIR 1974 SC 183, it was held that the fact that

the Advisory Board would have to consider the representations of the petitioners wherein they had raised the contentions that the grounds of detention are vague, would not prevent the Court from exercising its writ jurisdiction. It was held that the detenu has a right under Article 22(5) of the Constitution of India to be afforded the earliest opportunity of making a representation against the order of detention. The said Constitutional right includes within its compass the right to be furnished with adequate opportunity of the grounds of the detention order. However, if their constitutional right is violated, they have a right to come to the Court complaining that the detention is bad and violative of the fundamental rights. Besides, as to what the Advisory Board might do in the exercise of its jurisdiction, is not the concern of the Court. The Supreme Court in Piyush Kantilal Mehta v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 reiterated the observations in Prabhu Dayal's case (supra) and held that even though a representation is pending before the Advisory Board, a writ petition would be maintainable. Therefore, the pendency of the matter before the Advisory Board is in no way a bar to the entertainment of the writ petition or to hold that it is premature. In fact a writ to challenge an order of detention filed during the pendency of the detenu's representation would be maintainable.

Mr. Bhatti has laid considerable emphasis on the fact that in view of the earlier writ petition i.e. Writ Petition 708 of 1988 filed by the detenu before the Calcutta High Court, the present writ petition would not be maintainable. Strong reliance has been placed on the case of T.P. Moideen Koya v. Government of Kerala and others, AIR 2004 SC 4733 with pointed reference to para 11 thereof. Mr. Chaudhri, however, has

termed the said contention to be absolutely baseless and frivolous as the earlier writ petition was filed at the pre-detention/pre-execution stage whereas the present petition is post-execution and, therefore, there is no semblance or similarity between the two writ petitions. He has also referred to the provisions of Rule 15 falling under Part-II of Chapter 4(F) Volume 5 of the Rules and Orders of the Punjab and Haryana High Court, to contend that the present petition would not be a bar.

In T.P. Moideen Koya's case (supra), the Supreme Court considered the question whether dismissal by the Supreme Court of the SLP heard against the judgment and order of the Kerala High Court whereby the habeas Corpus petition filed by the wife of the petitioner seeking quashing of the detention order and also his release had been dismissed would act as a bar to the maintainability of the petition before the Supreme Court which had been filed under Article 32 of the Constitution of India. After referring to the various decisions, the Supreme Court in para 11 observed as follows:-

> "11. The principle which can be culled out from this (sic.) (these) authorities is that the bar of res judicata or constructive res judicata would apply even to a petition under Article 32 of the Constitution where a similar petition seeking the same relief has been filed under Article 226 of the Constitution before the High Court and the decision rendered against the petitioner therein has not been challenged by filing an appeal in the Supreme Court and has been allowed to become final. However, this principle, namely, the bar of res judicata or principles analogous thereto would not apply to a writ of

habeas corpus where the petitioner prays for setting him at liberty. If a person under detention files a writ of habeas corpus under Article 226 of the Constitution before the High Court and the writ petition is dismissed (whether by a detailed order after considering the case on merits or by a non-speaking order) and the said decision is not challenged by preferring a Special Leave Petition under Article 136 of the Constitution and is allowed to become final, it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of habeas corpus."

From the above observations, it is submitted by Mr. Bhatti that in view of the dismissal of the earlier writ petition by the Calcutta High Court, the detenu only has a remedy of filing a writ petition under Article 32 of the Constitution of India before the Supreme Court. However, it may be noticed that the earlier writ Petition 708 of 1988 before the Calcutta High Court was dismissed in default as no one had appeared for either of the parties. The order dated 27.2.2001 passed by the Calcutta High Court reads as under:-

"Amitabh A. Lala, J.

27.2.2001.

No one appeared for either of the parties. The writ petition is, as such, dismissed for default. Interim order, if any, is vacated. Rule, if any, is discharged.

Sd/- Assistant Registrar
High Court O.S. Calcutta."

After the dismissal of the writ petition on 27.2.2001, the detenu has

been detained on 16.7.2007. It is evident that in terms of the said order the matter was not adjudicated on the merits of the case. Besides, the said writ petition was at the pre-execution stage of the detention order and, therefore, was not a writ in the nature of habeas corpus. After detention of the detenu on 16.7.2007, a fresh cause of action has accrued to the petitioner and he has filed the present petition in this Court for issuance of a writ in the nature of habeas corpus alleging violation of his fundamental right. Therefore, whenever a complaint is made in respect of the violation of a fundamental right, a writ petition challenging the detention cannot be said to be barred. In fact, the Supreme Court in T.P. Moideen Koya's case (supra) has held that the principle of the bar of res judicata or constructive res judicata after a decision rendered in a writ petition and not challenging the same by filing an appeal and allowing it to become final would not apply to a writ of habeas corpus where the petitioner prays for setting him at liberty. If a person under detention files a writ of habeas corpus under Article 226 of the Constitution before the High Court and the writ petition is dismissed whether by a detailed order after considering the case on merits or by a non-speaking order and the said decision is not challenged by preferring a SLP under Article 136 of the Constitution and is allowed to become final, it would still be open to him to file an independent petition under Article 32 of the Constitution seeking a writ of habeas corpus. In the present case, the question whether a second writ of habeas corpus would lie, is not required to be gone into as admittedly the present is the first and only writ of habeas corpus that has been filed by the detenu against the order of his detention dated 8.3.1988 (Annexure P9). The earlier writ petition was not a writ in the

nature of habeas corpus. Besides, the detention order has been executed on 16.7.2007 within the territorial jurisdiction of this Court which furnishes a cause of action to the detenu to assail the same in this Court by way of a writ of habeas corpus. There is no bar to the exercise of the supervisory jurisdiction of this Court which this Court otherwise possesses. Mr. Bhatti, however, has emphasized that only a writ under Article 32 of the Constitution of India would be maintainable and not a writ under Article 226 of the Constitution of India. This, in my view, is devoid of merit. The jurisdiction of this Court to enforce fundamental rights under Article 226 is to be exercised whenever a complaint is laid alleging violation of the same. Therefore, the provisions laid down by the Supreme while considering the case under Article 32 of the Constitution would apply to the jurisdiction of this Court under Article 226 of the Constitution for enforcement of fundamental rights of the citizens. Besides, Part-F of Chapter 4 Volume 5 of the Rules and Orders of the Punjab and Haryana High Court deals with the Rules made by the High Court regulating proceedings under Article 226 of the Constitution. Part-2 of Part-F relates to habeas corpus petitions. Rule 15 thereof relates to second petition when not competent. The same reads as under:-

> **"15. Second petition when not competent. –** No petition for the issuance of a writ in the nature of habeas corpus shall lie in respect of the detention of a person on a ground on which a similar petition has already been dismissed. However, a second petition against the legality of the detention may be filed on the basis of a ground which has arisen after decision of the earlier petition, or was omitted therefrom for a reason which the Court

regards as exceptional and allows to be taken for the ends of justice."

Therefore, in terms of the High Court Rules and Orders, a second writ petition in the nature of habeas corpus is maintainable on a ground which has arisen after the decision of an earlier petition or was omitted therefrom for a reason which the Court regards as exceptional and allows to be taken for the ends of justice. As has already been noticed, the earlier petition was not one for the issuance of a writ in the nature of habeas corpus and, therefore, the contention of Mr. Bhatti of the writ petition being barred on account of the earlier petition being dismissed by the Calcutta High Court, is devoid of any merit.

The contention as regards the concealment of the trial in FIR 22 dated 29.1.1988 (Annexure-R.1) registered at Police Station, IGI Airport, New Delhi, it may be noticed, was not a ground of detention at the time of passing the detention order on 8.3.1988 (Annexure-P.9). In terms of the order dated 7.1.1992 (Annexure-R.2) passed by the Additional Chief Metropolitan Magistrate, New Delhi, the arguments on the charge were heard. It was observed that a prima facie case for framing charge under Sections 419 and 417 IPC was made out against the accused (detenu) as it had been alleged that on 20.1.1988 when the accused (detenu) was going to Hong Kong via Bangkok, he was found in possession of a Passport which he produced at the Airport which was in the name of Mohan Lal on which the photograph of the accused (detenu) was pasted and the accused (detenu) used the Passport dishonestly and fraudulently with a view to cheat the Immigration Authorities. Accordingly charge under Sections 419 and 417

IPC was framed against him to which he pleaded guilty. The learned Magistrate was satisfied that the accused (detenu) pleaded guilty to the charge voluntarily and, therefore, he was held guilty for the offences under Sections 419 and 417 IPC. He was heard on the point of sentence and he was released on probation. In the counter affidavit filed on behalf of the respondent, it is the accepted position that the FIR 22 dated 29.1.1988 (Annexure-R.1) is not a ground for passing the detention order. Therefore, if this is not the basis for passing the detention order, it cannot be said that any material or relevant fact which would have been germane for the decision of the writ petition, has been suppressed and which would merit dismissal of the writ petition on this ground alone. Though in such circumstances, it is desirable that the necessary facts are mentioned and pleaded. However, the present is not such a defect which, by itself, would warrant dismissal of the writ petition.

The objection regarding non-impleadment of the State of Punjab as a necessary party, is also inconsequential as it is the order that has been passed by the respondent which has been assailed. Besides, at the most, it would only affect the contention as regards the execution of the detention order which has been executed by the authorities of the State of Punjab. The order of detention passed by the respondent is under challenge. Therefore, it is for the respondent to satisfy this Court that all safeguards which affect the fundamental rights of the detenu in consonance with the provisions of Article 22(5) of the Constitution of India, have been complied with and adhered to and the writ petition cannot be dismissed on such a technicality.

Coming to the grounds of challenge to the detention order; the primary challenge is to the delay in execution of the detention order dated 8.3.1988 (Annexure-P.9) which has remained unexecuted till 16.7.2007. The detenu was apprehended by the Customs Officials at IGI Airport, New Delhi on 29.1.1988. After his arrest, his statement was recorded on 30.1.1988 under the Customs Act. On the same day, he was produced before the Additional Chief Metropolitan Magistrate, New Delhi along with application (Annexure-P.1) for seeking his remand. The detenu filed his application (Annexure-P.2) retracting from his statement. Thereafter, he was granted bail by the Additional Chief Metropolitan Magistrate, New Delhi on 1.3.1988 (Annexure-P.4). After his release on bail, the impugned order of detention was passed on 8.3.1988 (Annexure-P.9). The petitioner filed Writ Petition 708 of 1988 before the Calcutta High Court and the Hon'ble Court on 17.3.1988 (Annexure-P.5) ordered that let there be an interim order in terms of prayer (h) of the petition until 4.4.1988. Besides, liberty was also given to the respondents therein to apply for vacating the interim order upon notice to the petitioner. It is the admitted case of both the parties that the said interim direction continued till the writ petition was dismissed in default on 27.2.2001 (Annexure-P.1). However, nothing has been shown by the respondent as to whether they had filed counter in the writ petition or even applied for vacating the stay for which liberty was specifically granted in terms of order dated 17.3.1988 (Annexure P5) passed by the Calcutta High Court. In Union of India v. Amrit Lal Manchanda, AIR 2004 SC 1625, it was observed that merely because the High Court had granted stay of the order of detention, the respondent therein i.e. the detenu

cannot take advantage of the stay passed by the High Court to contend that there is passage of time between the order of detention and its service. It was observed that the detenu cannot be allowed to have an unfair advantage and double benefit of his own actions which delayed the execution of the detention order. A reference was made to the case of Sayed Taher Barwamia v. Joint Secretary to Government of India, (2000) 8 SCC 620 wherein the time gap between the detention order and its execution was nearly 16 years. As such, the detenu cannot take advantage of the period during which the stay granted by the Hon'ble Calcutta High Court on 16.3.1988 (Annexure-P.5) was operative till it was vacated on 27.1.2001 (Annexure-P.6). However, even subsequent to the vacation of stay and dismissal in default of the writ petition by the Calcutta High Court, there has admittedly been complete inaction on the part of the respondent to execute the detention order till it was actually served on 16.7.2007. The object of preventive detention, as is well known, is an anticipatory measure to prevent a person from indulging in activities which are prejudicial and affect the revenue by smuggling. The same do not relate to an offence. A person cannot be detained by way of preventive detention as a measure of punishment which is the domain of criminal proceedings, the object of which is to punish the offender for the offence committed by him. The two proceedings cannot be equated as parallel proceedings. The object of the preventive detention law is not punitive but only preventive. Therefore, Mr. Chaudhri is not wrong in his contention that the live link between the detention order and its execution is snapped. There is no explanation given by the respondent for the delay of about 6 years in the execution of the

order. After the vacation of the stay by the Hon'ble Calcutta High Court vide order dated 27.2.2001 (Annexure-P.6), the matter was attended to on 25.1.2006 when a letter was sent by the Delhi Customs to the Calcutta Customs to know the latest position of the case. This was followed by inter-departmental communications. In between, the detenu sent a representation dated 22.2.2006 for revocation of the detention order which was rejected on 17.4.2006. Thereafter, another letter dated 24.4.2006 was sent to the Kolkata Customs to know the status regarding the stay. Then the matter was referred to the Law Ministry which resulted in further communication between them. It is on 11.7.2007 that a letter was received from the Kolkata Customs informing about the vacation of the stay on 27.2.2001. Therefore, admittedly there has been no action to pursue the matter from the time the stay was vacated till the execution of the detention order. The only reason now given is that departmental inquiry has been ordered in the matter. In Bhawarlal Ganeshmalji v. State of Tamil Nadu, AIR 1979 SC 541, it was observed that the purpose of detention under COFEPOSA is not punitive. There must be a "live and proximate link" so that if there is a long and unexplained delay between the order of detention and arrest of the detenu, the order of detention may be struck down. The Court in appropriate cases may assume that the link is 'snapped' if there is a long and unexplained delay between the date of order of detention and the arrest of the detenu. In such a case, the Court may strike down the order of detention unless the grounds indicate a fresh application of mind of the detaining authority to the new situation and the changed circumstances. But where the delay is not only adequately explained and is found to be the result of recalcitrant or

refractory conduct of the detenu in evading the arrest, there is warrant to consider the link is not snapped but strengthened. In the present case, nothing has been shown that the detention order after the stay was vacated by the Hon'ble Calcutta High Court could not be executed on account of the recalcitrant and refractory conduct of the detenu in evading his arrest. In P.N. Hari Kumar v. Union of India, 1995(5) SCC 691, there was a delay of about four years in execution of the detention order which was not satisfactorily explained. The detenu was on bail but no attempt was made to approach the Courts for cancellation of bail. The Custom Authorities at whose instance the detention order was passed did not oppose the detenu's prayer seeking exemption from personal appearance in the criminal proceedings pending against him. The place where the Police searched for the detenu was not disclosed in the affidavit. No serious efforts were even made by the authorities to get proclamation published in accordance with Section 82(2)(ii) CrPC. It was observed the entire endeavour of the authorities was only to comply with the letter of Section 7 of the Act and not its spirit. It was held that the circumstances for the delay of execution of the detention order was not satisfactorily explained and the detention order was quashed. In Manju Ramesh Nahar v. Union of India, 1999 SCC (Cr.) 498, there was a delay of one year in arresting the detenu after the order of detention. The explanation that was given was that the detenu was absconding. No details were given by the authorities with regard to the steps taken by them to execute the order. It was observed that the authorities could have taken appropriate steps under Section 7 of the Act or even under the provisions of the CrPC for securing the arrest of the detenu. The effect

of non-execution of the order, it was held, was that the authorities themselves gave liberty to the detenu to carry on his earlier activities giving rise in the process to question whether the activities complained of, were really prejudicial activities within the meaning of Section 3 of the Act. The execution of the order of detention long after it was passed, it was observed would have the effect of vitiating the order as also the satisfaction of the authorities who passed the order.

In the present case, it is not the case of the respondent that the detenu has been absconding. Neither is it the case of the respondent that after the passing of the detention order and in respect of the incident at the Delhi Airport, the detenu has indulged in similar such activities. Nothing has been placed on record to show that the detention of the detenu would be necessary after this long lapse of time. Therefore, the order of detention dated 8.3.1988 (Annexure P9) is vitiated and is liable to be quashed on the ground of long delay in the execution of the order.

Keeping in view the fact that the order of detention is liable to be quashed on the ground of long delay, the other grounds raised in the writ petition with regard to the relevant material not being placed on record by the sponsoring authority to the detaining authority and that the relied upon documents were not supplied *parri passu* with the grounds of detention as also the effect of acquittal on the validity of the detention order, need not be gone into. The Supreme Court in Madhu Garg v. Union of India, (2004) 7 SCC 625 observed that when one of the grounds of detention is found to be based on irrelevant materials not germane for passing of the order of detention, the entire order of detention shall stand vitiated in law. Therefore,

the ground of delay in execution of the detention order having been found to be inordinate, the order of detention is unsustainable.

Consequently, the writ petition is allowed, the order of detention dated 8.3.1988 (Annexure-P.9) is quashed and the detenu shall be set at liberty, if not wanted in any other case.

September 10, 2007. **(S.S. Saron)**
**Judge**

*hsp*

**NOTE**: Whether to be referred to the Reporter or not:Yes/No